

**BEFORE THE NEBRASKA TAX EQUALIZATION  
AND REVIEW COMMISSION**

FREDEN B. PRICE,	)	
	)	
Appellant,	)	Case Nos. 07A-093, & 07A-094
	)	
v.	)	DECISION AND ORDER AFFIRMING
	)	THE DECISIONS OF THE DAWES
DAWES COUNTY BOARD OF	)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by Freden B. Price ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on May 21, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 15, 2008. Commissioners Wickersham, Warnes, and Hotz were present. Commissioner Warnes was the presiding hearing officer. Commissioner Salmon was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07).

Glenn Price, spouse of Freden B. Price, also known as Freden Birdsall Price, was present at the hearing without legal counsel.

Kent A. Hadenfeldt, Special County Attorney for Dawes County, Nebraska, was present as legal counsel for the Dawes County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2006). The final decision and order of the Commission in the consolidated cases is as follows.

**I.  
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining taxable value of the subject property is unreasonable or arbitrary; and

The taxable value of the subject property on January 1, 2007.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described as P<sub>TSW</sub>1/4N<sub>W</sub>1/4, P<sub>T</sub> N1/2S<sub>W</sub>1/4, Section 7, Township 32, Range 48 and P<sub>T</sub> S1/2S<sub>W</sub>1/4 Section 7, Township 32, Range 48, all in Dawes County, Nebraska, ("the subject property").
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Dawes County Assessor, value as

proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 07A-093

Description: P<sub>T</sub>S<sub>W</sub>1/4N<sub>W</sub>1/4, P<sub>T</sub> N<sub>1</sub>/2S<sub>W</sub>1/4, Section 7, Township 32, Range 48, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$19,710.00	\$16,450.00	\$19,710.00
Total	\$19,710.00	\$16,450.00	\$19,710.00

Case No. 07A-094

Description: P<sub>T</sub> S<sub>1</sub>/2S<sub>W</sub>1/4 Section 7, Township 32, Range 48, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$18,115.00	\$15,825.00	\$18,115.00
Total	\$18,115.00	\$15,825.00	\$18,115.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on February 15, 2008, set a hearing of the appeals for May 21, 2008, at 4:00 p.m. MDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
9. Taxable value of each parcel for the tax year 2007 is:

**Case No. 07A-093**

Agricultural land -	\$19,710.00
Total -	<u>\$19,710.00.</u>

**Case No. 07A-094**

Agricultural Land -	\$18,115.00
Total -	<u>\$18,115.00</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. 77-5016 (7) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

4. "Actual value, market value, and fair market value mean exactly the same thing."  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2006).
8. Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2006).
9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:
  - (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation

Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2)

(Cum. Supp. 2006).

10. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
11. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
12. The presumption disappears if there is competent evidence to the contrary. *Id.*
13. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
14. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

15. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."  
*Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
16. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
17. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
18. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
19. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
20. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
21. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and*

*Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### **IV. ANALYSIS**

Two appeals of the Taxpayer had been consolidated for purpose of hearing, Case Numbers 07A-093 and 07A-094. Both appeals are for parcels which are classified as unimproved agricultural parcels. The parcel described in Case Number 07A-093 consists of 108.65 acres. (E16:1). The parcel described in Case Number 07A-094, consists of 64 acres. (E 21:1). The Taxpayer's spouse testified that the two parcels of the subject properties adjoin each other. The subject properties were burned by a forest and range fire on July 28, 2006. (E1:1 and 2:1). The Taxpayer's spouse testified that he believed the actual values of the subject properties were lessened by destruction caused by the fire. Through his testimony he requested a 20% decrease in the taxable valuation of the subject properties. His testimony based the 20% reduction on a reduction by 10% to return to the 2006 taxable valuation and an additional 10% for loss to taxable valuation caused by the fire. The Taxpayer's spouse offered no other basis for his requested reduction in taxable value.

It is relevant to inquire how the presence of a loss of vegetation affects the fair market value. *See Walkenhorst v State of Nebraska*, 253 Neb. 986, 573 N.W. 2d 474 (1998).

The testimony of the Taxpayer's spouse did not detail the exact number of acres of the subject property that were damaged by fire. His testimony was that most of the total acreage of 172.65

was burned, but the evidence was unclear as to the exact number of acres damaged. Exhibit 3:1 contains estimates of burned acres, but it is not possible to determine how many of the burned acres were part of the subject property.

The testimony of the Taxpayer's spouse was that there should be a diminished taxable valuation to the subject property due to "tree loss" which he believed were lost forever; however, he testified that there were few trees on the subject property which were lost and this argument did not apply to the subject property. The Taxpayer's spouse did not offer an opinion of value or evidence as to the value of the subject property before the fire and its subsequent value after the fire.

The Taxpayer's spouse did not use the Sales Comparison approach to determining actual value of the subject property since there were no sales of comparable properties to the subject property which had experienced similar burned conditions.

The Taxpayer's spouse testified that prior to the fire he had used the subject property for the pasturing of 50 cows and 22 buffaloes.

After the fire he lost the ability to graze the animals for the balance of the 2006 year. His testimony was that his loss was confined to the balance of 2006 and that the grass would come back and be as good or better within two to three years. The Taxpayer's spouse testified that the value of grazing on his property was \$36 per acre per year. His testimony was that he received \$11 per acre from a Federal program for his loss of use of the subject property for grazing for the balance of the 2006 year which would have been from the date of the fire to December 31, 2006. The net loss of \$25 per acre per year was an indication of income loss, but the Taxpayer's spouse did not have itemized expenses or a capitalization rate with which to

calculate a diminished taxable valuation based on an income approach to valuing the subject property. Any reduction in income to the Taxpayer or increase in expenses was partially or fully offset by the Taxpayer's receipt of \$1,724.80 in compensation for the loss of the use of the subject property. (E4:2).

The Commission upon review of all of the evidence presented, does not find that the Taxpayer has met his burden to rebut the presumption that the County Board failed to faithfully perform its duties or did not have sufficient competent evidence to justify its actions. In addition, despite this fact, the Commission has reviewed all of the evidence presented and finds that the Taxpayer has not shown by the reasonableness of the evidence a different taxable valuation nor has he proven by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The appeal of the Taxpayer is denied.

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2007, are affirmed.
2. Taxable value, for the tax year 2007, of each parcel described in an appeal as referenced by the Case No. is:

**Case No. 07A-093**

Agricultural land	\$19,710.00
Total	<u>\$19,710.00.</u>

**Case No. 07A-094**

Agricultural Land	\$18,115.00
Total	<u>\$18,115.00</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dawes County Treasurer, and the Dawes County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.

7. This order is effective for purposes of appeal on August 7, 2008.

**Signed and Sealed.** August 7, 2008.

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York*

has roots in the early jurisprudence of Nebraska. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization assessment decisions. Neb Laws 1959, LB 55 §3. The statutory standard of review required the district Court to affirm the decision of the county board unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. Neb Laws 1995, LB 49 §153. Section 77-1511 of Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* Review of commission decisions was prescribed by statute to be for error on the record. *Supra* §19. In 2001 section 77-1511 of Nebraska Statutes was repealed. Neb Laws 2001, LB 465 §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of Nebraska Statutes. Commission decisions are reviewed for error on the record. Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006)

Many appeals of district courts decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). As noted however review was de novo and the reviewing court was not have been bound by the standard of review imposed on district court. The statutory standard of review applicable to the district courts was however considered in the review of a district court decision made pursuant to section 77-1511 in 1971. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even

though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See, *City of York Supra*. The burden of proof to overcome the presumption is competent evidence. *City of York Supra*. Clear and convincing evidence is required to show that the County Board's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the County Board failed to perform its duties or act upon sufficient competent evidence is not always evidence that the County Board acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York Supra*. Clear and convincing evidence that a County Board's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the County Board faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. Each analysis of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* The *Gordman* court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or

determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner